

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

AFFY TAPPLE, LLC<sup>1</sup>

Employer

And

TEAMSTERS LOCAL UNION 777

Petitioner

Case 13-RC-20982

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>3</sup>

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:<sup>4</sup>

All office clerical employees, including accounting, IT and customer service employees; excluding all plant employees, CFO, Customer Relations Manager, managers, guards, and supervisors as defined in the Act.

**DIRECTION OF ELECTION\***

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strikes who have retained their status, as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the

designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local Union 777.

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before **June 9, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by **June 16, 2003**.

**DATED** June 2, 2003, at Chicago, Illinois.

---

Regional Director, Region 13

\*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

- 1/ The names of the parties appear as amended at the hearing.
- 2/ The arguments advanced by the parties at the hearing and in the Employer's and Petitioner's brief have been carefully considered.
- 3/ The Employer is a corporation engaged in the business of making and selling candied apples and other confections.
- 4/ The Petitioner seeks to represent a unit of all office clerical employees, including accounting, IT and customer service employees; excluding all plant employees, CFO, Customer Relations Manager, managers, guards, and supervisors as defined in the Act.

### **The Parties' Contentions**

The Employer and Petitioner agree that an appropriate unit consists of "all office clerical employees, including accounting, IT and customer service employees; excluding all plant employees, CFO, Customer Relations Manager, managers, guards, and supervisors as defined in the Act." The only two issues raised by the parties concern whether Dominic Senese, a production planner, and Nancy Weinberger, an assistant director of marketing, are appropriately included in the unit.

The Petitioner contends that Senese is an office clerical employee. The Employer, on the other hand, asserts that Senese is a plant clerical employee who should be excluded from the unit. With regard to Weinberger, the Petitioner contends that she is a statutory supervisor. However, the Employer contends that she is not a statutory supervisor and should be included in the unit.

Based on the evidence set forth below, I find that Dominic Senese is a plant clerical employee who should be excluded from the office clerical unit. I find that the evidence is insufficient to determine the supervisory status of Nancy Weinberger. Accordingly, Senese is ineligible to vote and Weinberger may vote subject to challenge.

### **A. Background**

The Employer is engaged in the business of making and selling candied apples and other confections from its facility located at 6300 Gross Point Road, Niles, Illinois. The Employer's production department is on the first floor of the facility. On the second floor, are a variety of offices and cubicles. The Employer's managerial hierarchy consists of President Stuart Sorkin, Chief Financial Officer Carmel Cooke who is responsible for the day-to-day accounting activities, human resources activities, and information technology activities, Chief Operating Officer Bill Henry, and General Manager Leo Grigorio. In addition, the Employer employs Technology Coordinator Rob LaForte and Network Administrator Vinnie Senese to handle information technology matters.

**B. Dominic Senese**

About 2 ½ years ago, the Employer employed Dominic Senese as a materials manager. In this position, he was primarily responsible for making purchases and overseeing the dock and warehouse employees. He was also responsible for the shipment of freight and the maintenance of inventories. He worked in a cubicle located on the first floor within the production department. Senese reported to Director of Operations Mike Sacchetti.

On about January 1, 2003, the Employer reassigned Senese to the position of production planner and relieved him of his duties as material manager. This reassignment was prompted by the Employer's desire to insure that there was clear communication between the production and accounting departments so that management could make better decisions about the operation. Before this reassignment became effective, Cooke and Grigorio explained to Senese that he was to serve as a "policeman" who would report production problems to the accounting department. He was specifically instructed to notify the accounting department if production materials were disappearing or being scrapped without being accounted for by someone. He was likewise supposed to insure the accuracy of the production standards called bills of materials (BOMs) and update labor efficiency standards. At that time, Senese was provided an office on the second floor that was closest to the stairs leading to the production floor and began to report to Cooke.

As a production planner, one of Senese's primary duties is to generate material resource planning (MRP) reports, which combine the orders coming from the sales department with BOMs. The MRP reports take one hour per day to generate and show what products have been ordered by customers, what products need to be made, and when the products need to be made. The BOMs are utilized by the Employer to determine the process for making a particular product and the labor costs involved with that process. Senese is responsible for insuring the accuracy of the BOMs by obtaining information regarding both materials and labor costs from the production floor. He also sets standards for the various products, which impacts the Employer's profit and loss statements. Once a week, Senese meets with Grigorio to review the MRP reports and discuss the Employer's production needs. Senese makes recommendations to him about what materials should be purchased, the vendor from whom the materials should be purchased, and the date when the materials should be purchased. Grigorio ultimately decides whether to follow these recommendations. Senese spends about two additional hours per day generating production reports and ½ hour per week running labor efficiency reports that analyze the efficiency of the production employees. While Senese spends about 80% to 90% of his time at his computer terminal preparing and reviewing production and inventory data, he spends 10% to 15% of his time on the production floor. No other employee who works in the office located on the second floor spends this much time on the production floor. In this regard, marketing employees spend time on the production floor on the infrequent occasions when they have to insure that customer samples are produced correctly.

Senese is also involved in maintaining and monitoring inventory levels of production materials. When shortages or other discrepancies occur, he checks inventory levels both on the production floor and on his computer to determine if it was caused by production materials being miscounted, scrapped, or stolen. He communicates this information to Grigorio and the production supervisors. Sometimes he asks them to have the inventory recounted. If necessary, he will further communicate with them about the need to order materials to fill an order or maintain the minimum inventory stock levels that he has established. He will likewise

communicate with Grigorio and the production supervisors when production employees are not using the proper materials during production. In one instance, he requested the supervisors to inform the production employees to use 1 ½" tape rather than 2" tape and to use bags with foam peanuts rather than bubble wrap for certain orders. Moreover, Senese has previously monitored production by reviewing daily production reports that were provided to him by the supervisors. Grigorio decides whether to make any production changes based on information provided to him by Senese. It is estimated that Senese spends about 5% of his time with Grigorio.

Because the Employer recently installed a new computer system, Senese also spends part of his day identifying and attempting to resolve certain problems concerning the manner in which the computer has gathered production information. If the problem simply relates to the system, Senese will attempt to fix the problem on his own. But if the problem is more technical, Senese will report it to the IT employees so that they can fix it. He spends four or five hours per week dealing with technical issues of this sort. He also meets on almost daily basis with Cooke to discuss any issues that arise with respect to the computer system. However, Senese does not write computer code or have any experience as a computer programmer.

It is undisputed that Senese does not have any involvement in the performance of the following job duties: (1) preparing and mailing bills to customers; (2) working on payroll matters; (3) answering phone calls, responding to customer complaints, or placing sales calls to prospective customers; and (4) handling mail other than to verify that shipping bills are accurate.<sup>i</sup>

### **C. Legal Analysis: Status of Dominic Senese**

Under well-established Board law, office clerical employees and plant clerical employees cannot be joined in a single bargaining unit, absent the agreement of the parties. *Kroger Co.*, 204 NLRB 1055 (1973); *Fisher Controls Co.* 192 NLRB 514, 515 (1971); *Weyerhaeuser Co.*, 173 NLRB 1170, 1171 (1968). This is due to the fact that normally a distinct difference exists between office clerical employees and plant clerical employees. See e.g., *Dunham's Athleisure Corp.* 311 NLRB 175 (1993).

The test for making this determination is generally whether the employee's duties are related to general office operations (office clericals) or related to the production process (plant clericals). The distinction is ground in community-of-interest concepts. *Cook Composites & Polymers Co.*, 313 NLRB 1105 (1994). Typical office clerical duties are billing, payroll, phone, and mail. *Virginia Mfg. Co.*, 311 NLRB 992 (1993); *Dunham's Athleisure Corp.*, supra. In contrast, typical plant clerical duties are timecard collection, transcription of sale orders to forms to facilitate production, maintenance of inventories, and ordering of supplies. *Hamilton Halter Co.*, 270 NLRB 331 (1984).

In the instant case, I find that Dominic Senese is a plant clerical employee who should be excluded from the office clerical unit. The record establishes that Senese does not perform any of the typical office clerical duties relating to billing, payroll, phone, or mail. But rather, he performs all four of the typical plant clerical duties with the exception of timecard collection.

---

<sup>i</sup> On occasion, Senese might also receive a bill relating to discounts, freight, or something else that would change the labor efficiency standards. This might require him to update the standards in the Employer's computer system.

First, Senese converts sales orders into production requirements by generating MRP reports that let the production staff know what products have been ordered by customers, what products need to be made, and when the products need to be made. He further involves himself in this production process by regularly reviewing the MRP reports with Grigorio and discussing various production needs. For example, Senese will make recommendations regarding what materials should be purchased, the vendor from whom the materials should be purchased, and the date when the materials should be purchased. He likewise reviews and updates BOMs, which determine the process for making a particular product and the labor costs involved with that process. This requires him to interact and obtain information from Grigorio and the production supervisors. As a result of these and certain inventory duties discussed below, Senese regularly spends about 10% to 15% of his time on the production floor and 5% of his time working with Grigorio. No other office employee regularly spends such a substantial portion of their workday on the production floor.

Second, Senese maintains production material inventory and investigates discrepancies resulting from production employees not properly accounting for shortfalls in inventory. He may request that Grigorio and the production supervisors recount inventory levels. Senese involves him further with this aspect of production by making written recommendations to Grigorio concerning materials that should be ordered to maintain the minimum inventory levels that he (Senese) has established. On occasion, Senese's involvement with the inventory also results in him reminding production supervisors to have their employees utilize specific materials when completing certain types of orders.

Third, as discussed above, Senese is responsible for ordering supplies in the sense that he regularly makes recommendations to Grigorio regarding the purchasing of production materials.

Finally, the record does not warrant a finding that Senese otherwise shares a significant community of interest with the office clerical employees. The fact that Senese occupies an office on the second floor is given less weight herein because it is removed from the offices of the admitted clerical employees and is actually adjacent to the stairs leading to the production floor. While it is true that Senese occasionally has interaction with IT employees concerning problems with the computer system, this simply consists of him reporting the problem to the IT employees so that they can fix it. There is insufficient evidence in the record to determine whether Senese shares common supervision with other office clerical employees. However, the evidence shows that he spends a substantial portion of his time working closely with Grigorio and the production supervisors in order to complete his duties.

#### **D. Nancy Weinberger**

In about November 2001, Weinberger was employed by the Employer as an assistant director of marketing. She is involved with determining the types of products that are going to be sold and their appearance. She also works with vendors to obtain information regarding the types of ornaments that are going to be used by the Employer. In July and August 2002, Weinberger oversaw the work of Wendy Bettinger, a marketing coordinator. Weinberger directed Bettinger's work and signed off on her vacation requests. But in September 2002, Weinberger ceased functioning in this role because Bettinger was moved to another department. The record does not contain any evidence showing that Weinberger exercised any of the indicia



of a supervisor during the past eight months. Weinberger has previously occupied an office on the second floor that is adjacent to Sorkin's office and reported to him. While Weinberger is a salaried employee, there is no evidence regarding her level of compensation.

About two weeks prior to the instant hearing, Weinberger moved to New York for personal reasons and because she is planning on taking maternity leave in the near future. She is still employed by the Employer on a full-time basis as an assistant director of marketing. Her current job duties consist of going on sales calls and obtaining products from vendors in New York and other cities on the East Coast.<sup>ii</sup> The record does not contain any other evidence regarding her current duties. The Employer, however, states that it expects her to return to her former position at the end of her maternity leave.

While the Union attempted to subpoena Weinberger to testify at the hearing<sup>iii</sup>, she did not appear as she was in New York as discussed above. In an offer of proof, Union asserted that if Weinberger would have appeared, she would have testified that she had hired employees in the past, approved leave requests, and that Bettinger reported to her directly. However, the record shows that the Union also subpoenaed and reviewed company records with regard to Weinberger's status, but did not introduce any subpoenaed documents into the record.

#### **E. Legal Analysis: Supervisory Status of Nancy Weinberger**

Section 2(11) of the Act defines a supervisor as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

While the exercise of any one of these types of authority is sufficient to confer supervisory status, it is well-settled that such authority must be exercised "with independent judgment on behalf of management and not in a routine or sporadic manner" (Citation omitted), *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990); *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). The exercise of some supervisory authority "in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee." (Citation omitted). *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986); *Clark Machine Corp.*, 308 NLRB 555 (1992). In each case, the differentiation must be made between the exercise of independent judgment and the routine following of directions; between effective recommendation and forceful suggestion; and between appearance of supervision and supervision in fact. *See, Chevron Shipping Co.*, 317 NLRB 379 (1995); *J.C. Brock Corp.*, 314 NLRB 157 (1994). Because the statute is ambiguous as to the degree of discretion required for

---

<sup>ii</sup> The Employer has customers such as Saks Fifth Avenue, Bloomingdale's, and Nieman Marcus in New York. Its biggest customer, QVC, is also located in Pennsylvania.

<sup>iii</sup> The Union served the subpoena for Weinberger at the Employer's place of business. The Employer took the position that this was improper service as Weinberger was, in their view, not a supervisor within their control. Further, the Employer stated it did not have a current address in New York for Weinberger.

supervisory status, it is within the Board's discretion to determine the issue. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001); *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54, *slip op.* at 1-2 fn. 3; *Dynamic Science, Inc.*, 334 NLRB No. 57 *slip op.* at 1 (2001).

In the instance case, there is insufficient record evidence to establish that Weinberger is a supervisor within the meaning of Section 2(11). As the burden of demonstrating supervisory status rests on the party seeking to establish that status, Weinberger would normally be found to be an eligible voter. *Kentucky River*, 532 U.S. at 710; *Alois Box Co.*, 326 NLRB 1177 (1998). However, in the instance case, Weinberger was subpoenaed by the Petitioner, but failed to appear. As such, it is the opinion of the undersigned that it would be inappropriate to find that the Petitioner failed to meet its burden of proof concerning her status. Accordingly, in the circumstances herein, I find that Weinberger may vote under challenge, and, if necessary her status can be resolved later.

### **CONCLUSION**

Based upon all the evidence, I find that Dominic Senese is a plant clerical employee who should be excluded from the office clerical unit. I find that Nancy Weinberger may vote under challenge, and, if necessary, her status may be resolved at a later date. I hereby direct an election to determine if the employees in the above-described unit wish to be represented by the Petitioner.

There are approximately nine employees in the unit found appropriate.

440-1760-1900  
440-1760-1920  
177-8500